Foreign Enlistment Act and since *in pari delicto melior est conditio defendentis*. Whether or not this declaration did admit the plaintiff's criminality may well be doubted. Though it stated that the plaintiff's act had rendered him liable to punishment for crime, his good faith was also alleged and by the demurrer admitted. These allegations were doubtless inconsistent, since ignorance of essential facts would prevent the existence of the criminal intent. Judge Kennedy assumed, however, the construction most favorable to the defendant: that this was one of that limited class of statutory crimes which require no general intent. To such cases he wisely denied the application of the defendant's broad proposition (though laid down by Lord Lyndhurst, C. B., in *Colburn* v. *Patmore*, 1 Cr. M. & R. 73) that no criminal can have an action for indemnity against one who participated in his offence.

It would seem, indeed, that wherever a plaintiff through reasonable mistake of fact has subjected himself to prosecution or suit, he may seek indemnity from one who procured his wrongful act. Thus, one who innocently converted goods in reliance on the misrepresentations of the defendant may have indemnity. *Adamson* v. *Jarvis*, 4 Bing. 66. On the contrary, a plaintiff, who had accepted a bill of exchange to compound a felony which the defendant was about to prosecute, could not seek indemnity for costs sustained in a suit on the void bill by a worthless indorsee of the defendant. *Fivaz* v. *Nichols*, 2 Com. B. 501. From these cases it appears that the true interpretation of the maxim of *par delictum* emphasizes less the fact that the parties are liable for the same faults, than the fact that the faults are equal. The test of the latter is the parties' intent. They are not equally at fault when the plaintiff can say as a reasonable man that he committed the offence without evil intent at the instigation of the defendant.

Revocation of Guaranty by Death of Guarantor.—The confusion in the law as to whether the death of a guarantor amounts to a revocation of his guaranty, in so far as reliance upon it after that time is concerned, rests mainly upon the fact that many courts fail to distinguish between the several groups into which such contracts naturally fall. In a bare agreement to guarantee, made in the expectation of a future sale to a third person, it is difficult to find any consideration until such sale actually takes place. A sale made after the death of the guarantor, therefore, cannot amount to a completion of the contract; for the doctrine of mutual assent demands that both parties be living at the time the contract is made. It is different, however, when the consideration passes upon the making of the agreement to guarantee. Here the bargain is complete; hence the liability of the guarantor is not terminated by his death but passes to his executors or administrators. *Kernochan* v. *Murray*, 111 N. Y. 306. The result is the same in a guaranty under seal, though it rests on a different principle; it is the seal and not the passing of any consideration that makes it a contract. It would seem to make no difference, therefore, if the guarantor dies before any action is taken in regard to his guaranty.

The authorities are not entirely in accord with the views here expressed. In *Jordan* v. *Dobbins*, 122 Mass. 168, it was held that a guaranty even though under seal is revoked by the death of the guarantor. This case is quoted at some length and with approbation in a recent decision of the Kentucky Court of Appeals. *Aitken* v. *Lang's Admr.*, 51 S. W. Rep.

154 (Ky.). Yet in the latter case there is nothing to show that the guaranty was under seal. Though the ultimate judgment is correct, therefore, the court seems to have taken no notice of the fundamental difference between a simple contract and a covenant. Yet in carrying out to its fullest extent the doctrine advocated above, one is met by a twofold difficulty. To say that the guarantor's death does not revoke the guaranty under seal is to impose upon the guarantor's estate a heavy burden that may last for an indefinite length of time, though the estate of the guarantor may look to equity for relief. See *National Eagle Bank* v. *Hunt*, 16 R. I. 148. On the other hand, when the guaranty is not under seal, the holder is often induced to act in reliance upon it after the death of the guarantor and before he has had notice of that fact. As in the law of agency the death of the principal revokes the agent's authority without notice, so here there is at common law no escape from this difficulty.

Ex Post Facto Laws. — It is well settled that a retroactive law which increased the punishment of a crime is, as to offences committed before that time, an *ex post facto* law, and hence under our Federal Constitution a nullity. Whether, however, a mere change in the nature of the punishment inflicted is to be deemed within the constitutional limitation is a question on which the courts do not agree. According to some authorities any law is *ex post facto* which makes an act punishable "in a manner in which it was not punishable when committed," or "which increases the punishment with which an act was punishable when committed." *Shepherd* v. *The People*, 25 N. Y. 406. On the other hand it has been held that the substitution for one form of punishment of another that is undoubtedly less severe is not an *ex post facto* law. This doctrine would seem to be more in accordance with the apparent object of the constitutional provision, did it not leave the whole question as to the relative severity of punishments to judicial discretion. This discretion, moreover, seems to be of a highly variable nature as between the different States. In Indiana a maximum punishment of imprisonment for seven years was deemed to be less severe than the infliction of not more than one hundred stripes. *Strong* v. *State*, 1 Blackf. 193. Owing to the great degradation of the punishment stripes have been held to be worse than the death penalty. *Herber* v. *State*, 7 Tex. 69. Yet in South Carolina a change from death to fine, imprisonment, and whipping was allowed by the Court of Appeals. *State* v. *Williams*, 2 Rich. 418.

In the light of these conflicting views as to the relative severity of various punishments, and as to which the criminal would prefer to suffer, — for in reality that is the ultimate test, — it would seem that the better rule is that which excludes any change in the manner of punishment, — excepting only a change from death to life imprisonment. Many authorities support this exception, and recently it has received the sanction of the Supreme Court of Mississippi, where, "to obviate the scruples of those conscientiously opposed to the infliction of the death penalty," a statute gives the jury discretionary powers to fix the punishment for murder at life imprisonment or death. This change was held not to be *ex post facto*. *McGuire* v. *State*, 25 So. Rep. 495 (Miss.). This exception only may well be allowed to the rule of strict construction. To go farther, however, is to leave to the discretion of the court questions which the precedents seem to show are difficult of decision and often unsatisfactory in result.